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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1337

EDWARD DEVINE JOHNSON, *et al.*,

Petitioners,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

REPLY BRIEF FOR PETITIONERS

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The petition for certiorari raises two issues: (1) the validity, under the First Amendment, of state criminal trespass convictions and (2) the constitutionality of a system whereby a defendant who appeals his conviction from a state non-record court may receive a harsher sentence following a trial *de novo* in a court of record. For the most part the brief in opposition simply joins those two issues and requires no response.

However, the respondent has raised one claim which requires rebuttal.

In its brief in opposition it claims, at page 18, that petitioners have raised an issue in this Court not properly presented below. The issue in question is the petitioner's claim of "clear punitive intent by the judge and prosecutor" in forcing a jury trial on petitioners and in characterizing the underlying offense as a very serious one. Pet. for Certiorari, p. 11.

The respondent is factually in error. Not only at the *de novo* trial in the Circuit Court of Rockingham County (TT. 1-2, 123-38) but in their Petition for Writ of Error to the Supreme Court of Virginia (at pp. 19-20) and in their Appellant's Brief (at pp. 28-29) the petitioners raised their objection to a jury's being forced upon them when only questions of law were at issue. At all relevant court levels petitioners continually objected to being tried by a jury. The implication that a "clear punitive intent" was involved in refusing to allow this waiver is a fair inference drawn directly from the material facts in the record. Objection was timely made and preserved, and it cannot be said that the question is raised here for the first time.

In any event, there is no dispute that the primary issue —the validity of higher sentences on appeal to a trial *de novo*—has clearly been raised. The added factor represented by the contention of punitive intent merely underscores the validity of the Fourth Circuit rule and the need for this Court to grant certiorari.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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